STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 13, 2013
v	No. 305509 Gogebic Circuit Court
DENNIS JOHN HAHN, SR., Defendant-Appellant.	LC No. 2010-000303-FC

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of first-degree felony murder, MCL 750.316(1)(b), first-degree home invasion, MCL 750.110a(2), and arson of a dwelling, MCL 750.72. He was sentenced as a second habitual offender to 20-30 years for the home invasion and the arson convictions and to life imprisonment without parole for the felony murder conviction. We affirm the convictions, and remand for resentencing.

I. BASIC FACTS AND PROCEDURAL HISTORY

According to the testimony presented at trial, the victim sideswiped defendant's car on September 11, 2009. Defendant chased him until the victim crashed into a ditch. According to defendant, the victim appeared drunk, and offered to pay him $200 if he would not call the police. Defendant eventually dropped the victim off after receiving some money from him. A friend of defendant testified that defendant told him he went to the victim's home the next day for the rest of the money, but the victim "gave him the runaround" and told him to come back later. Defendant then told his friend that he "beat the guy's ass." He also told his friend that he found lighter fluid, sprayed it around, set the place on fire, and watched it burn from the woods. Defendant told police, to the contrary, that when he went to the victim's home, he entered through an unlocked door, found a wallet with $60 in it, took the money, and then left. He told the police that he did not remember if the victim was there.

Volunteer firefighters responded to the scene and discovered the victim's body in the hallway. A shotgun lay next to the victim on his right side, with the barrel pointing toward the victim's feet. The victim had sustained a gunshot wound on his chest and neck. After a brief initial investigation, the lead officer and the medical examiner determined that the death had resulted from a suicide. They did not process the trailer as a crime scene. No x-rays or measurements of the victim's wounds were taken. There was no autopsy. However, several

months later, while investigating another theft and arson, new evidence came to light regarding defendant's involvement with the victim, so the investigation was reopened. Defendant was subsequently convicted and now appeals.

II. GREAT WEIGHT OF THE EVIDENCE

Defendant first argues that the jury's verdict is against the great weight of the evidence, and that the trial court therefore erred in denying his motion for judgment notwithstanding the verdict (JNOV) and motion for a directed verdict of acquittal. We disagree.

We note as a threshold matter that the proper method of preserving an objection to the weight of the evidence is a motion for a new trial, not a motion for directed verdict or JNOV. See MCR 2.611(A)(1)(e); *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). The proper challenge to the denial of a motion for a directed verdict or JNOV is a challenge to the sufficiency of the evidence.[1] *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Because no motion for a new trial on this ground was made,[2] we conclude that defendant has failed to preserve this issue for appellate review. We therefore review defendant's claim for plain error affecting his substantial rights. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). "To avoid forfeiture, the defendant bears the burden to show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error prejudiced substantial rights, i.e., the error affected the outcome of the lower court proceedings." *Id*. at 618.

"The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs." *Dawe v Dr Reuvan Bar-Levav & Assoc, PC (On Remand)*, 289 Mich App 380, 401; 780 NW2d 272 (2010). "The issue usually involves matters of credibility or circumstantial evidence, but if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder." *Id*. In other words, "[a]bsent exceptional

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[1] This is not a distinction without a difference. "Due process commands a directed verdict of acquittal when sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt is lacking." *People v Lemmon*, 456 Mich 625, 633-634; 576 NW2d 129 (1998) (internal quotation marks and citations omitted). A review of the sufficiency of the evidence is specifically not concerned with the weight of such evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). The ability to grant a new trial on the grounds that the verdict was against the weight of the evidence, by contrast, is granted by statute and court rule, and involves the discretion of the trial court. MCL 770.1; MCR 6.431; *Lemmon*, 456 Mich at 634. Having failed to seek the exercise of that discretion, defendant has failed to preserve this issue for appeal. See *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997).

[2] As discussed in Section IV, *infra*, defendant did move the trial court for a new trial on the grounds of denial of due process and ineffective assistance of counsel related to his shackles.

circumstances," the issue of credibility should be left for the trier of fact. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). Exceptional circumstances that may justify a new trial include testimony that

> contradicts indisputable physical facts or laws, where the testimony is patently incredible or defies physical realities, where a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror, or where the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies. [*Id*. at 643-644 (citations and internal quotation marks omitted).]

"[T]he jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

Defendant contends that the accounts of the prosecution witnesses were not credible because they were either drinking, under the influence of controlled substances, not paying attention, or were motivated by potential criminal charges due to their own actions. However, at trial defendant impeached each of the witnesses, and the jury made a determination to believe their testimony in spite of his impeachment. This type of impeachment evidence is not the type of exceptional circumstance that would warrant the trial court interfering with the jury's assessment of credibility.

Further, defendant asserts that there were critical weaknesses in the prosecution's case because the prosecution did not prove which gun was used in the killing, no autopsy was performed, the length of the victim's body and the gunshot wound were not measured exactly, the scene was not treated as a crime scene, and no DNA or latent print evidence was collected. This essentially amounts to an argument that, without this crucial evidence, the jury's verdict was against the great weight of the evidence. We do not find this argument persuasive. Essentially, defendant mistakes a lack of complete evidence of the circumstances surrounding the killing for a case where the evidence clearly preponderates toward defendant's innocence.

In this case, competent evidence supports the prosecution's theory that the police and the medical examiner were incorrect in their initial conclusion that the victim killed himself. Evidence that the death did not result from a suicide was presented to the jury. This included testimony concerning a lack of motive for suicide, the location of the gunshot wound, the positioning of the gun along the victim's body, the inability to use a long gun to self-inflict this type of wound, and the lack of other evidence to show that the victim used either his feet or an object to discharge the firearm.

Competent evidence also clearly supports that the fire was not set accidentally, and because the victim had no detectable levels of carbon monoxide in his blood, it is unlikely that the victim set the fire. Further, the verdict was supported by testimony of defendant's admission concerning the fire and his other statements concerning the circumstances surrounding the death as well as timing of defendant's revealed knowledge of these circumstances. Multiple witnesses also testified about defendant's prior run-in with the victim. Moreover, the testimony clearly supports that defendant stole several items from the victim's house, including a Red Wings jacket, a commemorative coin or medallion, and a snowsuit. Viewing the evidence as a whole,

the verdict was not against the great weight of the evidence.

III. OTHER ACTS EVIDENCE

Defendant next asserts that the trial court abused its discretion in admitting, pursuant to MRE 404(b), other acts evidence concerning his involvement in an earlier arson of and theft from an automobile. We disagree. This Court reviews the trial court's decision to admit other acts evidence for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). "A trial court abuses its discretion when it chooses a result that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007).

"Use of other acts as evidence of character is generally excluded to avoid the danger of conviction based on a defendant's history of misconduct." *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). To be admissible under MRE 404(b), generally bad acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). "A proper purpose for admission is one that seeks to accomplish something other than the establishment of a defendant's character and his propensity to commit the offense." *Johnigan*, 265 Mich App at 465.

In this case, the prosecutor sought to introduce other acts evidence to show the existence of a common plan or scheme, which is a proper purpose specifically included in MRE 404(b). "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). A general similarity between the charged and uncharged acts does not alone establish a plan, scheme, or system used to commit the acts; however, logical relevance is not limited to only circumstances in which the charged and uncharged acts are part of a single continuing conception or plot. *People v Dobek*, 274 Mich App 58, 86; 732 NW2d 546 (2007). "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Sabin (After Remand)*, 463 Mich at 65-66.

Here, the trial court admitted evidence that defendant and an accomplice broke into a car and stole items, after which defendant lit the car on fire with a gasoline-soaked shirt. Defendant argues that the acts only have a general similarity, so they are not sufficient to establish a common plan or scheme. The prosecution alleged that the similarities between the other act and the charged crime included the fact that, in both cases, the incident took place in a rural area, a theft occurred, and a fire was set with accelerants. The court found that the other acts evidence was not overly prejudicial, and that there were sufficient similarities including the use of an accelerant in each fire, the fact that both crimes occurred in a rural area, and the fact that defendant stole items both from the automobile and the victim's home. The other acts evidence thus supported the finding that defendant utilized the common scheme or plan of covering up theft by starting fires with accelerants, and further supported the trial court's findings that there

were similarities between the other acts and the charged conduct, such that the decision to admit this evidence did not constitute an abuse of discretion.[3]

Furthermore, a nonconstitutional evidentiary error does not merit reversal unless, "after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (internal quotations omitted). Limiting instructions can protect a defendant's right to a fair trial. *People v Magyar*, 250 Mich App at 416. Here, the trial court twice instructed the jury about the proper purpose for the other acts evidence. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, the trial court's instructions alleviated any danger of unfair prejudice and protected defendant's right to a fair trial. Finally, as indicated above, there was ample circumstantial evidence of defendant's guilt for a jury to convict defendant even without the other acts evidence.

IV. SHACKLES

Defendant also argues that he was denied his right to a fair trial because the trial court had him shackled during trial with Tuff-Tie restraints. We agree that the trial court erred in having defendant shackled; however, we find that the error did not prejudice defendant because no evidence suggests that the jury actually saw the shackles.

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[3] The partial dissent opines that we "find[] a 'plan' in a variety of highly dissimilar bad acts lacking any connecting thread," and asserts that defendant had "no common goal in the crimes" but merely manifested a "general desire to engage in criminal behavior." We respectfully disagree. Although the prosecution indeed describes the instant case as one that "began as an incident of road rage [and] ended with murder," the dissent does not deny that defendant broke into the victim's home, stole items, and subsequently set fire to the home. Although defendant also was discovered by the victim and murdered him, the admission of other acts evidence does not require that the two crimes be identical; rather there need only be "sufficient common factors to infer a plan, scheme, or system to do the acts." *Sabin (After Remand)*, 463 Mich at 66. Here, we find more than a series of similar spontaneous acts; instead, we find sufficient evidence of a common scheme or plan of commission of theft followed by arson. We also emphasize that the admission of evidence is within a trial court's discretion. *Crawford*, 458 Mich at 383. Although there were differences between the instant offense and the other acts evidence, such differences were available to be pointed out at cross-examination; the trial court's admission of this evidence was not outside the range of principled outcomes. *Orr*, 275 Mich App at 588-58. We note that we do not "avoid" the prosecution's label of defendant as a "fire bug," as the partial dissent suggests, but rather give it no weight; indeed, it does not appear the trial court weighed it in admitting the challenged evidence, nor did defendant object to the characterization on appeal. Finally, we note that even if the admission of other acts evidence in this case were a close call, "a court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

We review the decision to shackle a defendant for an abuse of discretion under the totality of the circumstances. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009).

Generally, allowing a criminal defendant to appear in court free from restraint is an important component to ensuring a fair trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994); *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005), abrogated in part on other grounds *Fry v Pliler*, 551 US 112; 127 S Ct 2321; 168 L Ed 2d 16 (2007). Appearing before the jury in shackles undermines a defendant's presumption of innocence. *Deck*, 544 US at 630; *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). The use of physical restraints can interfere with a defendant's right to counsel by inhibiting his ability to communicate, and can otherwise inhibit the defendant's ability to participate in his own defense, such as by affecting his choice whether to testify. *Deck*, 544 US at 631. The "routine use of shackles in the presence of juries" undermines the "symbolic yet concrete objectives" of the judicial process, namely "[t]he courtroom's formal dignity, which includes the respectful treatment of defendants," and the "seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve." *Id.* at 631.

Here, prior to trial, defendant moved the court to allow him to be unshackled in the presence of the jury. The motion was addressed in chambers. The trial court elected to restrain defendant with "Tuff Tie" restraints. After trial, defendant filed a motion with this Court to remand for an evidentiary hearing and to file a motion for a new trial on the grounds of violation of due process and ineffective assistance of counsel. On remand, the trial court denied defendant's motion for a new trial.

At the evidentiary hearing held subsequent to remand, the trial court stated that it had decided to shackle defendant because:

> we have (1) an individual who is a – incarcerated in the State penitentiary, ah, for a serious crime; under the direction of the Department of Corrections being tried for murder, in the Gogebic County Circuit Court . . . and I made a determination that there was virtually no chance that . . . that the tuff ties would be observed by any juror; and that is the reason that I decided that he would be tuff tied.

Also at the evidentiary hearing, defendant testified that he did not have any behavioral problems in prison, he had not threatened to escape, he had not threatened to injure anyone in the courtroom during his trial, he was not disruptive, and he only had one misconduct at another facility for disobeying a direct order. No contradictory evidence was presented.

On these facts, the trial court abused its discretion in ordering defendant shackled. There was nothing indicating that the shackles were necessary to prevent defendant from escaping, injuring others in the courtroom, or maintaining order in the courtroom. *Dunn*, 446 Mich at 425. The trial court's stated reason for shackling, that defendant was incarcerated for a serious crime, was not the type of "state interest specific to a particular trial" the United States Supreme Court has determined may justify shackling a defendant, but rather resembles the sort of "routine" use of shackles that is not permitted. *Deck*, 544 US at 629, 631. In fact, defendant's trial counsel testified that she was told that Tuff Ties were "what we normally use." Further, the trial court's

statement that it had determined that there was "virtually no chance" that defendant's restraints would be observed by the jury, while relevant to the issue of prejudice as discussed *infra*, is not relevant to the decision to require such restraint.

However, to justify reversal of a conviction on the basis of being shackled, the defendant must show that prejudice resulted. *Payne*, 285 Mich App at 186. "A defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id*. (citing *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). After conducting the evidentiary hearing following this Court's remand, the trial court found that "there is virtually no possibility" that the jurors saw defendant's restraints. The court also noted that in order to see the restraints, the jury would have had to look through a rail that had boxes stacked up against it during the trial. Further, defendant was restrained with Tuff Tie restraints, which, according to the testimony at the evidentiary hearing, "look like a black shoelace that have a plastic clip in the center." The trial court also found that defendant's testimony that he was shackled in front of the jury was not reliable. Thus, there is simply no evidence that being shackled actually prejudiced defendant, and we decline to grant defendant a new trial on this ground.[4]

V. SENTENCING

Finally, defendant argues that he is entitled to resentencing because the trial court did not score his convictions for first degree home invasion and arson and that the sentences imposed for those convictions constitute an obvious upward departure.

MCL 771.14(2) provides in relevant part:

> A presentence investigation report prepared under subsection (1) shall include all of the following:
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> * * *
>
> (e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII, all of the following:
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> * * *
>
> (ii) Unless otherwise provided in subparagraph (i), for each crime having the highest crime class, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.

[4] Defendant's motion for a new trial following remand also argued that his trial counsel was ineffective for failing to object to defendant allegedly being restrained in front of the jury on the first day of trial. Defendant does not raise this issue on appeal; therefore we decline to address it. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

(iii) Unless otherwise provided in subparagraph (i), the computation that determines the recommended minimum sentence range for the crime having the highest crime class.

Further, MCL 777.21(2) requires that "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI [MCL 777.14], score each offense as provided in this part." In *People v Mack*, 265 Mich App 122, 127-128; 695 NW2d 342 (2005), this Court held that when a defendant is convicted of multiple offenses, a presentence investigation report (PSIR) need only be prepared for the felony conviction with the highest crime class, and that the trial court did not err in concluding that the sentencing guidelines are not applicable to the defendant's lower crime class conviction. Here, however, defendant was convicted of three crimes, two of which are scorable offenses.[5] Both arson of a dwelling house, MCL 750.72, and first-degree home invasion, MCL 750.110a(2) are class B felonies. Contrary to the plain language of MCL 771.14(2), neither conviction was scored in the pre-sentence investigation report (PSIR); contrary to MCL 777.21(2), the trial court also scored neither conviction.

We agree with defendant that this constituted error, because the trial court failed to score either of the Class B felonies of which defendant was convicted. See *People v Johnigan*, 265 Mich App 463, 467, 472; 696 NW2d 724 (2005) (Sawyer, J., lead opinion) (remanding for resentencing, and holding that the trial court erred in failing to score the defendant's only conviction assigned to a crime class). We also agree with defendant's assertion that, had the scoring occurred, the minimum sentences imposed would have exceeded the guideline scoring.[6] The sentences thus constitute an upward departure from the sentencing guidelines. When departing from the guidelines range, the trial court's articulation of the reasons for the departure must be sufficient to permit appellate review. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). If a trial court fails to articulate reasons for its departure, the remedy is not for this Court to independently determine that a sufficient reason exists, but to remand for rearticulation or resentencing. *Smith*, 482 Mich at 304.

At oral argument, the prosecution conceded that remand for resentencing was required under *Johnigan*. We do note that where, as here, a defendant has also been convicted of an offense punishable by mandatory life imprisonment, there is at least an argument that the trial court's error was harmless. Indeed, the prosecution so argued in its brief on appeal in this case.

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[5] Felony murder is not a scorable offense because it carries a mandatory life sentence. MCL 750.316(1). MCL 769.34(5) provides that "[i]f a crime has a mandatory determinant penalty or a mandatory penalty of life imprisonment, the court shall impose that penalty" and the sentencing guidelines do not apply. Felony murder thus does not possess a "crime class." See generally MCL 777.16a-19 (enumerating felonies to which the sentencing guidelines apply).

[6] Given the highest possible prior record variable (PRV) level and offense variable (OV) level, and taking into account defendant's second habitual offender status, the absolute highest recommended minimum sentence range for a class B offense would be 117 to 200 months. See MCL 777.63. In this case, defendant was sentenced to a minimum of 240 months for each offense.

However, given that the prosecution expressly abandoned this claim at oral argument, we decline to address it. See *Finch v W.R. Roach Co*, 299 Mich 703, 708; 1 NW2d 46 (1941) (declining to address an assignment of error abandoned on oral argument). We therefore reverse and remand to the trial court for resentencing on defendant's convictions for first degree home invasion and arson. Upon remand, a PSIR shall be prepared scoring defendant's scoreable offenses according to MCL 771.14, and the trial court shall score defendant's scoreable offenses according to MCL 771.21. Should the trial court choose to depart from the recommended guidelines range, it shall provide sufficient articulation of its reasons for departure to permit appellate review. *Smith*, 482 Mich at 304.

We affirm defendant's convictions, and remand for resentencing in part. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Mark T. Boonstra